

Disputes between members of a construction joint venture

October 2019

Authors: [Julian Bailey](#), [Karim Mariey](#)

The case of *Doosan Enpure Limited v Interserve Construction Limited* represents a rare consideration by the English High Court of a dispute between members of a construction joint venture. The court found that Interserve was in breach of the Joint Venture Agreement and that Doosan was entitled to over £5 million of interim payments.

It is common for contractors or developers to enter into a joint venture for carrying out a specific project (or projects). Construction joint ventures of this kind allow members to share specialist knowledge in addition to sharing the financial and other risks of the project. A construction joint venture may also be necessary where local laws require any 'foreign' contractor to have a local partner.

Doosan Enpure Limited v Interserve Construction Limited [2019] EWHC 2497 (TCC)

In *Doosan v Interserve*, the English High Court considered a dispute between two members of a construction joint venture ("JV") who had undertaken to carry out the upgrade of the Horsley Water Treatment Works in Northumberland. The Employer was Northumbrian Water Limited ("NWL") and the Parties entered into a contract under the NEC3 Option C form, a target cost contract with an activity schedule under which the financial risks are shared between the Employer and the Contractors in agreed proportions. The members of the JV also entered into a joint venture agreement ("JVA").

A dispute arose between the parties regarding the interim payments to which Doosan was entitled. Interserve argued that Doosan had already been paid more than its entitlement taking account of, amongst other things, the pain/gain share mechanism. Payments to Doosan were suspended.

The case turned on the construction of the JVA. The court found that interim payments were to be made without adjustments, and that adjustments for pain/gain share would take effect at the conclusion of the project. Accordingly, the court declared that Doosan was entitled to the release of over £5 million from the JV account.

Comment

In addition to its consideration of the pain/gain share mechanism in the NEC3 Option C form of contract, this case also demonstrates some of the types of disputes which may arise between members of a construction joint venture.

Notably, the court found that the terms of the Contract with NWL were relevant to the construction of the JVA because defined terms from the Contract were carried over into the JVA. This highlights the importance of ensuring, to the extent possible, that the terms of the JVA are consistent with the relevant construction contract(s) and that the JVA sets out which agreement, i.e. the JVA or the Contract, takes precedence where there is an inconsistency.

Further, careful consideration must be given to the delineation of the works to be carried out by each joint venture member. The JVA between Doosan and Interserve, for example, provided that each party bore all commercial, technical and other risks in respect of the parts of the works it had undertaken to complete. However, difficulties and disputes in this regard can arise where both parties are carrying out elements of the same item of work (for example, where one party is responsible for the substructure and the other for the superstructure of a building). In these circumstances, delay to one JV member's works may well have an impact on the other JV member. The parties in *Doosan v Interserve* sought to deal with this by requiring the parties to keep each other informed and to take steps to minimise delay.

Joint ventures also often have in place a committee, on which each member is represented, which is responsible for managing the joint venture's affairs. The authority of such committees, including the issues on which it can decide, must be clearly defined in the JVA. In *Doosan v Interserve*, for example, the JV committee was empowered to make decisions in respect of the payments to each member of the JV; however, any such decision required the consent of both Doosan and Interserve and a unanimous decision of the JV committee. Provisions such as this can allow one member to, in effect, block any payments being made to the other member, therefore, potentially leading to cash flow constraints.

Conclusion

Doosan v Interserve therefore serves as a reminder to members of construction joint ventures of the potential for intra-JV disputes. The terms of the JV agreement between the joint venture members, and the relationship of the joint venture agreement with the relevant construction contract, must be given careful consideration in order to help prevent such disputes. Including mechanisms for the quick and effective resolution of disagreements and deadlocks between the JV members, whilst seeking to preserve a good relationship between them, is highly desirable if not essential.

White & Case LLP
5 Old Broad Street
London EC2N 1DW
United Kingdom

T +44 20 7532 1000

In this publication, White & Case means the international legal practice comprising White & Case LLP, a New York State registered limited liability partnership, White & Case LLP, a limited liability partnership incorporated under English law and all other affiliated partnerships, companies and entities.

This publication is prepared for the general information of our clients and other interested persons. It is not, and does not attempt to be, comprehensive in nature. Due to the general nature of its content, it should not be regarded as legal advice.